

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KEVIN LENEAR CAMP,

Petitioner,

vs.

D. NEVEN, et al.,

Respondents.

Case No. 2:09-CV-01117-GMN-(RJJ)

ORDER

Before the court are the second amended petition for writ of habeas corpus (#17), respondents' motion to dismiss (#40), petitioner's opposition (#43), and respondents' reply (#44). The court finds that the petition is timely and that petitioner has exhausted his available state-court remedies for the grounds in issue. The court denies the motion (#40).

After a jury trial in the Eighth Judicial District Court of the State of Nevada, petitioner was convicted of murder by child abuse. Ex. 63 (#23). Petitioner appealed, and the Nevada Supreme Court affirmed on May 14, 2002. Ex. 81 (#23). Petitioner petitioned the panel of that court for rehearing, and the petition was denied on July 10, 2002. Ex. 82, 83 (#23). Petitioner then petitioned the Nevada Supreme Court for en banc reconsideration, and that petition was denied on October 31, 2002. Ex. 84, 87 (#23).

Petitioner then pursued post-conviction remedies in the Eighth Judicial District Court. He filed a habeas corpus petition on November 3, 2003. Ex. 90 (#24). On December 22, 2003, he filed an amended petition that was identical to the original petition but with exhibits attached. Ex. 92 (#24). The state district court granted the petition in part. Ex. 155 (#30). Both parties appealed.

1 On March 27, 2009, the Nevada Supreme Court reversed the partial granting of the petition and
 2 affirmed the denial of the rest of the petition. Ex. 198 (#31). Petitioner petitioned for rehearing,
 3 and the Nevada Supreme Court denied the petition on May 13, 2009. Ex. 203 (#32). Remittitur
 4 issued on June 9, 2009. Ex. 204 (#32).

5 Petitioner then commenced this action on June 22, 2009. The court directed petitioner to file
 6 an amended petition because his original petition (#1) contained no grounds for relief. Order (#4).
 7 Petitioner filed an amended petition (#6) on August 13, 2009. The court appointed the Federal
 8 Public Defender to represent petitioner, and petitioner then filed the second amended petition (#17)
 9 on September 27, 2010. The court dismissed ground 9 and directed respondents to respond to the
 10 rest of the petition. Order (#36).

11 Respondents first argue that this action is untimely. Congress has limited the time in which
 12 a person can petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254:

13 A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a
 14 person in custody pursuant to the judgment of a State court. The limitation period shall run
 from the latest of—

15 (A) the date on which the judgment became final by the conclusion of direct review or the
 expiration of the time for seeking such review;

16 (B) the date on which the impediment to filing an application created by State action in
 violation of the Constitution or laws of the United States is removed, if the applicant was
 prevented from filing by such State action;

17 (C) the date on which the constitutional right asserted was initially recognized by the
 Supreme Court, if the right has been newly recognized by the Supreme Court and made
 18 retroactively applicable to cases on collateral review; or

19 (D) the date on which the factual predicate of the claim or claims presented could have been
 discovered through the exercise of due diligence.

20 28 U.S.C. § 2244(d)(1). A judgment, if appealed, becomes final when the Supreme Court of the
 21 United States denies a petition for a writ of certiorari or when the time to petition for a writ of
 22 certiorari expires. Jimenez v. Quarterman, 129 S. Ct. 681, 685 (2009). See also Sup. Ct. R. 13(1).

23 The time to file a petition for a writ of certiorari runs from the date of entry of the judgment
 24 or order sought to be reviewed, and not from the issuance date of the mandate (or its
 equivalent under local practice). But if a petition for rehearing is timely filed in the lower
 25 court by any party, or if the lower court appropriately entertains an untimely petition for
 26 rehearing or sua sponte considers rehearing, the time to file the petition for a writ of
certiorari for all parties (whether or not they requested rehearing or joined in the petition for
rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the
 subsequent entry of judgment.

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1 Sup. Ct. R. 13(3) (emphasis added). Any time spent pursuing a properly-filed application for state
2 post-conviction review or other collateral review does not count toward this one-year limitation
3 period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when the post-conviction
4 judgment becomes final upon issuance of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015
5 n.2 (9th Cir. 2005).

6 The key dispute between the parties is when the period of limitation commenced after the
7 conclusion of direct review of petitioner's judgment of conviction. The parties agree that the
8 petition for panel rehearing and its denial would affect the commencement of the time to petition the
9 Supreme Court of the United States for a writ of certiorari. See Sup. Ct. R. 13(3); see also Ex. 82,
10 83 (#23). By implication, the commencement of the period of limitation in 28 U.S.C. § 2244(d)
11 also would be affected. Jimenez, 129 S. Ct. at 685. The parties disagree over the effect of the
12 petition for en banc reconsideration by the Nevada Supreme Court and its denial. See Ex. 84, 87
13 (#23). Respondents argue that the petition for en banc reconsideration did not affect the
14 commencement of time to petition for a writ of certiorari. However, other than an inapposite
15 citation to Jimenez, they provide no authority that supports their position. In the Nevada Supreme
16 Court, the correct procedure for seeking rehearing is first to ask the panel for rehearing and then, if
17 the panel denies rehearing, to ask the full court for en banc reconsideration. Nev. R. App. P. 40,
18 40A.¹ Petitioner followed that procedure, and his petitions were timely. This court sees no reason
19 why Supreme Court Rule 13(3) would not give a timely petition for en banc reconsideration the
20 same respect that it gives a timely petition for rehearing. Consequently, the time to petition the
21 Supreme Court of the United States for a writ of certiorari commenced after the Nevada Supreme
22 Court denied petitioner's petition for en banc reconsideration on October 31, 2002, and the
23 judgment of conviction became final on January 29, 2003.

24 The petition is timely. Between January 29, 2003, and November 3, 2003, when petitioner
25 filed his state habeas corpus petition, two hundred seventy-eight (278) days passed. Those
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28 ¹In contrast, in federal courts of appeal the correct procedure is to ask for panel rehearing and
en banc rehearing at the same time. Fed. R. App. P. 35, 40.

1 proceedings concluded with the issuance of the remittitur on June 9, 2009. Another thirteen (13)
 2 days passed before petitioner filed his original petition (#1) in this court on June 22, 2009.² A total
 3 of two hundred ninety-one (291) days passed, and that is well within the one-year period of
 4 limitation of § 2244(d)(1).

5 Respondents next argue that petitioner has not exhausted his available state-court remedies
 6 for several grounds. Respondents admit that grounds 2(B)(6) and 2(B)(8) are exhausted, and they
 7 continue to assert that grounds 2(B)(2), 6(A), and 11 are unexhausted. Reply, p. 5 (#44).

8 Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must
 9 exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a
 10 petitioner must fairly present that ground to the state's highest court, describing the operative facts
 11 and legal theory, and give that court the opportunity to address and resolve the ground. See Duncan
 12 v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v. Harless, 459 U.S. 4, 6 (1982).

13 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state
 14 remedies only if he characterized the claims he raised in state proceedings specifically as federal
 15 claims. In short, the petitioner must have either referenced specific provisions of the federal
 16 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.
 17 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). “The mere similarity between
 18 a claim of state and federal error is insufficient to establish exhaustion. Moreover, general appeals
 19 to broad constitutional principles, such as due process, equal protection, and the right to a fair trial,
 20 are insufficient to establish exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999)
 21 (citations omitted).

22 Ground 2(B)(6) is a claim of ineffective assistance of counsel. Petitioner alleges that if his
 23 trial counsel had obtained all relevant medical records of the child he was accused of killing by child
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25 ²Respondents use this date in their calculations. Motion, p. 7 (#40). The second amended
 26 petition (#17), filed on September 27, 2010, is the operative petition. For purposes of timeliness, it
 27 can relate back to the original petition (#1) pursuant to Rule 15(c) of the Federal Rules of Civil
 28 Procedure “[s]o long as the original and amended petitions state claims that are tied to a common
 core of operative facts” Mayle v. Felix, 545 U.S. 644, 664 (2005). Respondents apparently
 assume that the second amended petition (#17) relates back to the original petition (#1) even though
 the original petition (#1) contained no grounds for relief. See Order (#4).

1 abuse, and if trial counsel had provided those records to petitioner's expert witness, then the expert
2 witness would have been able to challenge the prosecution's claim of when the child died. In his
3 amended state habeas corpus petition, petitioner did not discuss what the expert witness would have
4 done with those medical records. However, petitioner did claim that counsel was not prepared for
5 trial and that counsel admitted as much in a hearing before the start of jury selection; petitioner cited
6 to the transcript of that hearing. Ex. 92, p. 8 (#24). In that hearing, counsel stated that both he and
7 the expert witness did not have all of the relevant medical records of the child, and that the expert's
8 conclusions would be confirmed or denied if she could possess those records. Ex. 34, pp. 3-4 (#19).
9 The state district court determined that counsel had failed to file timely discovery motions to obtain
10 the child's medical records. Ex. 155, p. 5 (#30). In the appeal, arguing in support of the state
11 district court's decision, petitioner noted that counsel had not obtained all of the relevant medical
12 records of the child. Ex. 190, pp. 34, 38 (#31). The Nevada Supreme Court held that counsel was
13 not ineffective for failing to file discovery motions, because counsel discovered only right before the
14 start of trial that the medical records existed. Ex. 198, pp. 7-8 (#31).

15 The only additional fact not presented to the Nevada Supreme Court was what counsel
16 would have done with those records: Counsel would have given them to petitioner's expert witness
17 so that she could confirm or discard her conclusions about the death of the child. "[N]ew factual
18 allegations do not render a claim unexhausted unless they 'fundamentally alter the legal claim
19 already considered by the state courts.'" Chacon v. Wood, 36 F.3d 1459, 1468 (quoting Vasquez v.
20 Hillery, 474 U.S. 254, 260 (1986)). The operative facts of this claim were counsel's failure to
21 obtain the medical records of the child, and those facts were before the state courts. The additional
22 elaboration of what counsel would have done with those records does not alter the claim. Ground
23 2(B)(2) is exhausted.

24 Ground 6(A) is a claim of ineffective assistance of retained pre-trial counsel James
25 Buchanan. Buchanan withdrew after the preliminary hearing, and the Clark County Public Defender
26 then represented petitioner. The Clark County Public Defender then withdrew after it was
27 discovered that the office also represented the mother of the deceased child. That conflict of interest
28 is the topic of ground 6(B), and respondents do not argue that petitioner failed to exhaust his

1 available state-court remedies for ground 6(B). With respect to ground 6(A), petitioner claims that
2 Buchanan: (1) failed to seek prompt drug testing for both petitioner and Brook Lain, the mother of
3 the deceased child, to show who was under the influence of methamphetamine at the time; (2) failed
4 to attempt to prevent the cremation of the deceased child until a defense expert could examine the
5 body; (3) after his withdrawal and the filing of a complaint with the State Bar of Nevada by
6 petitioner's parents, disclosed confidential communications and allowed a doctor he had retained to
7 write a letter to the bar.

8 Petitioner raised ground 6(A) in state ground 2. Ex. 92, pp. 11-12 (#24). In its minute order,
9 the state district court did not address Buchanan's performance. Ex. 139 (#29). In its formal order,
10 the state district court denied ground 2 summarily. Ex. 155, p. 8 (#30). In the opening brief section
11 of his appeal brief, petitioner incorporated by reference every claim that the state district court
12 denied. Ex. 190, p. 49 (#31). The Nevada Supreme Court said that it would "address each
13 remaining claim that was denied by the district court below."³ Ex. 198, p. 10 (#31). The Nevada
14 Supreme Court then addressed all the claims in Ground 6(A). Id., pp. 13-15. Ground 6(A) is
15 exhausted.

16 Ground 11 is a claim that petitioner's constitutional rights to a fair trial and to due process of
17 law were violated by the admission of evidence of his prior bad acts. On direct appeal, petitioner
18 argued that the admission of prior-bad-act evidence violated state law. Ex. 74, pp. 28-29 (#23).
19 However, in his state habeas corpus petition, petitioner argued that the admission of prior-bad-act
20 evidence also violated the federal constitution. Ex. 92, p. 15 (#24). As with ground 6(A), petitioner
21 raised this ground on appeal by incorporating his petition by reference. Ex. 190, p. 49 (#31). The
22 Nevada Supreme Court noted that petitioner had raised this claim in his petition. Ex. 198, p. 15 n.4
23 (referring to claim 3) (#31). It also noted that petitioner had raised the claim on direct appeal, and
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27 ³"Parties shall not incorporate by reference briefs or memoranda of law submitted to the
28 district court or refer the Supreme Court to such briefs or memoranda for the arguments on the
merits of the appeal." Nev. R. App. P. 28(e)(2). Apparently, the Nevada Supreme Court waived
this requirement for petitioner.

1 subsequent litigation is barred by the law of the case. Id., p. 15 & n.5. The Nevada Supreme
2 Court's order shows that it recognized that petitioner raised the issue. Ground 11 is exhausted.

3 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#40) is **DENIED**.

4 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date
5 of entry of this order to file and serve an answer, which shall comply with Rule 5 of the Rules
6 Governing Section 2254 Cases in the United States District Courts. Petitioner shall have forty-five
7 (45) days from the date on which the answer is served to file a reply.

8 DATED this 18th day of August, 2011.

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13 Gloria M. Navarro
14 United States District Judge
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